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NOTES ON SOME RECENT SUPREME COURT CASES RELATING TO THE *SITUS* OF INTANGIBLE PERSONAL PROPERTY, FOR PURPOSES OF TAXATION.

It has been familiar law for a long time that the taxing power of the States of the American Union is limited by the extent of their jurisdiction, and that this limitation will be enforced by the federal Judiciary.[1] But although the principle itself has long been acknowledged, there has been some uncertainty as to the precise provision or provisions of the federal Constitution upon which the power of the federal Judiciary to restrain State action should be predicated.

In *McCulloch* v. *Maryland,* while referring to the general rule as almost "self-evident" and based upon the "soundest principles", Chief Justice Marshall treated the particular question at issue as

[1] "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

Marshall, C. J., in McCulloch *v.* Maryland (1819) 4 Wheat. 316, 429.

"Property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication would be necessary to establish so obvious a proposition.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

Field, J., in case of the State Tax on Foreign-held Bonds (1872) 15 Wall. 300, 319.

"While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of Constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government."

Harlan, J., in Louisville & Jeffersonville Ferry Co. *v.* Kentucky (1903) 188 U. S. 385, 396.

"a question of supremacy", and rested his decision as to the unconstitutionality of the Maryland tax upon the activities of the Bank of the United States, upon the general framework of the Constitution, and "the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land."[2] In the case of the *State Tax on Foreign-held Bonds,* Mr. Justice Field, although he qualified the general proposition as "obvious", relied in the particular case upon the clause of the Constitution forbidding any State to impair the obligation of contracts. And it is interesting to note that although this case was decided in 1872 and the Fourteenth Amendment was ratified more than four years previously, no reference is made in the opinion to the due process of law clause. In a more recent case, *Louisville & Jeffersonville Ferry Company* v. *Kentucky,* the Court while speaking of the principle as "inhering in the very nature of a Constitutional Government," based its decision upon the ground that the State, by taxation without jurisdiction, had deprived the ferry company of its property "without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."[3]

It is upon this ground that the right to restrain the attempts of a State to extend its taxing power to objects not within its jurisdiction is now ordinarily rested by the federal Judiciary.[4]

Turning from the constitutional to the philosophic basis for the rule confining the taxing power of a State to matters within its jurisdiction, the Supreme Court in the case of the *State Tax on Foreign-held Bonds* appealed to the maxim that "taxation is the correlative of protection,"[5] and argued that the State cannot possibly give protection to property beyond its jurisdiction. And this statement of the reason of the rule has been several times repeated and elaborated in the opinions of the Court.[6]

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[2](1819) 4 Wheat. 433.

[3](1903) 188 U. S. 398.

[4]Louisville & Jeffersonville Ferry Co. *v.* Kentucky (1903) 188 U. S. 385, 398; Delaware, etc. R. R. *v.* Pennsylvania (1905) 198 U. S. 341, 358; Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 202. But see the expression of Holmes, J., at p. 211, by way of dissent, doubting whether the result reached "can be deduced from the Fourteenth Amendment." Buck *v.* Beach (1907) 206 U. S. 392, 409.

[5](1872) 15 Wall. 322.

[6]In Kirtland *v.* Hotchkiss (1879) 100 U. S. 491, the Court speaks of taxes being rendered to a State "in return for the protection it affords them," pp. 498, 499; and in Diamond Match Co. *v.* Ontonagon (1903) 188 U. S. 82, 90, it refers to "the principle that protection is the consideration of taxation." And in a still more recent case the Court says:

It may therefore be regarded as the settled law of the United States Supreme Court that the taxing power of a State of the American Union is limited by its jurisdiction, either inherently or by virtue of the due process of law clause of the Fourteenth Amendment, and the Court seems to find the philosophic justification of this rule in the maxim that "taxation is the correlative of protection."

The statement of this general principle at once opens up a whole vista of perplexing constitutional questions with respect to the limits of State jurisdiction. The great case of *McCulloch* v. *Maryland* is typical of one great line of limitation, namely, the rule that the State may not tax the instrumentalities of the federal government, which although they may be physically within its borders are withdrawn by the Constitution from the field of its jurisdiction. Another great line of decisions marks out a limitation perhaps as difficult to trace as any in all our constitutional law, which forbids such State taxation as amounts to a prohibited intereference with interstate and foreign commerce—another subject withdrawn to a certain extent from the jurisdiction of the State.

But the object of this paper is merely to consider and endeavor to co-ordinate certain recent Supreme Court cases illustrating what may be called the ordinary common law rule limiting the jurisdiction and therefore the taxing power of the State to property having its *situs* within its borders—a comparatively simple matter, involving no constitutional provision except the ubiquitous due process of law clause, and yet a matter which, owing to the expanding commercial life of the country, has given rise to some interesting and difficult problems.

A number of Supreme Court decisions have dealt with the general question of *situs* for taxation, and the fundamental rules by which the Court will be guided with respect thereto are reason-

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax." Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 202. See also 204.

ably well-defined. These rules are most clearly illustrated by the decisions with respect to tangible property, which will first be noted as affording a basis for departure for the consideration of the more difficult questions presented by some of the recent cases dealing with intangible personal property.

REAL PROPERTY.

So far as real property is concerned the situation is comparatively simple. Land has its *situs* for taxation in the State where it lies. In such State, however, it may be taxed to its owner or owners, resident or non-resident, legal or equitable, according to their respective interests and the law of the State.

"Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated, without contravening any provision of the Constitution of the United States."[7]

No State appears to have ever attempted to tax land lying beyond its borders, on the ground that the owner thereof was domiciled in the taxing State. But the case of the *Louisville & Jeffersonville Ferry Company* v. *Kentucky* involves the same situation in principle. Here the Board of Valuation and Assessment of the State of Kentucky in assessing for taxation a ferry franchise across the Ohio river, granted by Kentucky, included the value of the reciprocal franchise granted by Indiana and taxed the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises. The United States Supreme Court held that this amounted in fact to taxing the Indiana franchise, which was "an incorporeal hereditament derived from and having its legal *situs* in that State," and amounted to a violation of the Fourteenth Amendment "as much so as if the State taxed the real estate owned by that Company in Indiana."[8]

[7]Savings & Loan Society *v.* Multnomah County (1898) 169 U. S. 421, 431-432, expressly overruling dicta to the contrary in the case of the State Tax on Foreign-held Bonds. See *infra,* pp. 384, 385. It should be noted, however, that under the statute in question, as the court found, "the personal obligation of the mortgagor to the mortgagee is not taxed at all;" and compare Kirtland *v.* Hotchkiss, *infra,* pp. 385, 386.

[8](1903) 188 U. S. 385, 398. See also a sweeping dictum to the same effect in Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 204.

TANGIBLE PERSONAL PROPERTY.

As regards tangible personal property the situation was originally complicated by the insistent and convenient legal fiction *mobilia sequuntur personam.* But this fiction has had to yield to the facts of modern life, and it is now settled that tangible personal property (unless in interstate transit) has a taxable *situs* where it is actually found on the date when tax returns are made out, irrespective of the domicile of the owner.[9]

As a corollary to this ruling it has also been held that tangible personal property located outside the State of its owner's domicile cannot be taxed to him in that State.[10] Difficulties will doubtless continue to arise from time to time, in applying this rule to novel and complicated facts.[11] But the rule of law appears to be clear—that tangible property like land, must be taxed to its owner where it is actually found, and not elsewhere.

THE GENERAL RULE AS REGARDS INTANGIBLE PERSONAL PROPERTY.

But how stands the case with respect to intangible personal property? Does the same rule apply, and can such property be

[9]See Brown *v.* Houston (1885) 114 U. S. 622, and other cases collected in Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 206. Compare the special rule with reference to ships, enunciated in Hays *v.* Pacific Mail Steamship Co. (1854) 17 How. 596, holding that the act of Congress requiring vessels to be registered at the port nearest the residence of the owner or manager fixes the *situs* of such vessels for taxation at that port and renders them immune from taxation elsewhere.

[10]Delaware, L. etc. R. R. *v.* Pennsylvania (1905) 198 U. S. 341; in taxing the capital stock of a Pennsylvania corporation, the value of coal owned by the corporation but which was, at the time of the assessment, situated in other States and not intended to be returned to Pennsylvania, may not be included. Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 207 *et seq.*; cars owned by a refrigerating company permanently employed without the State may not be taxed by the State in which the company is incorporated.

[11]See Pullman's Palace Car Co. *v.* Pennsylvania (1891) 141 U. S. 18, 26, sustaining a tax upon the capital stock of a foreign corporation having at all times a large number of cars within the State, the amount of the tax being ascertained "by taking as the basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States over which its cars were run." This decision and other similar decisions show that the courts do not intend to permit property which in the nature of things is constantly in motion—like railway cars—to escape taxation because of any supposed difficulty of determining its exact physical location on tax return day. In such cases the State will be permitted in some equitable way, not objectionable as amounting to a prohibited regulation of Interstate Commerce, to determine the average amount of such mobile property within its borders and to tax this average amount as having its *situs* there. See Marye *v.* Baltimore & Ohio R. R. (1888) 127 U. S. 117, 123-124.

said to be actually found anywhere? Where, for instance, is a debt actually located as a taxable asset; at the domicile of the creditor or the debtor, in the jurisdiction where the contract which gave rise to the obligation was entered into, or where it must be enforced, or where the evidence of that contract is kept? And if such property does not admit of actual location anywhere, to which one of these jurisdictions should it be constructively attributed? Where does it receive that protection which is said to be the correlative of taxation?

The practical difficulties in determining the actual *situs* of intangible as compared with tangible personal property are obvious; and as a result the maxim *mobilia sequuntur personam* has fared far better as respects the former than as respects the latter, and still remains, generally speaking, the legal rule of thumb which is applied in determining the *situs* of intangible personal property. As the Supreme Court remarked in the course of its opinion in *Union Transit Company* v. *Kentucky*,[12]

"There is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained."

And again, the Court remarks in a still more recent case,[13]

"Generally speaking, intangible property in the nature of a debt may be regarded, for the purpose of taxation, as situated at the domicile of the creditor and within the jurisdiction of the State where he has such domicile. It is property within that State."

The leading Supreme Court cases illustrating the general rule that intangible personal property has its *situs* for taxation in the State of its owner's domicile and not elsewhere are the case of the

[12](1905) 199 U. S. 194, 205. See also Louisville & Jeffersonville Ferry Co. *v.* Kentucky (1903) 188 U. S. 385, 397, 398; Board of Assessors *v.* Comptoir National (1903) 191 U. S. 388, 403.

[13]Buck *v.* Beach (1907) 206 U. S. 392, 401.

State Tax on Foreign-held Bonds,[14] and *Kirtland* v. *Hotchkiss.*[15] Although they have been much discussed, and the former frequently criticised, somewhat qualified and as to certain dicta overruled, it is believed that they are still law, that the rule which they illustrate is still for all practical purposes the general rule, and that the more recent decisions qualifying this rule can not be properly understood and correlated without a thorough understanding of these two basic cases.

The case of the *State Tax on Foreign-held Bonds* itself rests on the earlier case of *Railroad Company* v. *Jackson*[16] decided four years previously. In that case a Pennsylvania statute taxed the interest on bonds secured by a mortgage given by a railway corporation and binding every part of the road, which lay partially in Pennsylvania and partially in Maryland. The road, as directed by the statute, deducted the tax on interest due to a non-resident bondholder. He sued the road, and recovered in the lower court, apparently because of his non-residence. On error the Supreme Court affirmed the judgment upon the ground that to the extent that the mortgaged road lay in Maryland, Pennsylvania was "taxing property and interests beyond her jurisdiction."[17]

Then came the great case of the *State Tax on Foreign-held Bonds,* which was as follows: The State of Pennsylvania in 1868 laid a tax of five per cent on interest paid by Pennsylvania corporations to their bondholders. The defendant railway company had previously issued bonds as follows: $500,000 in 1854, principal and interest payable in Philadelphia; $1,000,000 in 1859 and $1,000,000 in 1867, principal and interest payable in the city of New York. "All the bonds were executed and delivered in Cleveland, Ohio, and nearly all of them were issued to, and have been ever since held and owned by non-residents of Pennsylvania and citizens of other States."[18] The Pennsylvania State treasurer apportioned the interest due by the defendant railway company to its bondholders according to its mileage within and without Pennsylvania (this of course in order to take the case out of the *ratio decidendi* of *Railroad Company* v. *Jackson*), and settled an account against the company for five per cent of the amount representing the mileage within the State. The Supreme Court of Pennsylvania

[14] (1872) 15 Wall. 300.
[15] (1879) 100 U. S. 491.
[16] (1868) 7 Wall. 262.
[17] (1868) 7 Wall. 267.
[18] (1872) 15 Wall. 300, 301-302.

sustained this tax, but on writ of error, the United States Supreme Court reversed the judgment, holding that the bonded indebtedness of the road held by non-residents was beyond the jurisdiction of the State of Pennsylvania. In the course of its opinion the Court used the following language:[19]

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. . . . The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. . . . The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt."

The court proceeded to hold that the Pennsylvania law was not "a legitimate exercise of the taxing power", and was unconstitutional as impairing the contract of the bondholders. A like result was reached in two other cases decided at the same time, which differed in their facts only in that the bond issue was subsequent to the State legislation.

The court in concluding its opinion pushed its argument in two respects further than was necessary for the decision of the case, which could have been rested on the grounds already stated. In the first place the court took the ground that a mortgage in Pennsylvania was "a mere chose in action", and observed that: "This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner."[20]

[19]At pp. 320, 322.

[20](1872) 15 Wall. 300, 323.

As has already been noted, this dictum has been qualified by subsequent cases holding that the mortgagee's equitable interest in land may be taxed to him in the State where the land lies, under a statute expressly taxing such interest.[21]

Again, not content with stating the general doctrine that the property in debts belongs to the creditors and "follows their domicile", the court goes on to say, "but other personal property [*i. e.*, other than State and municipal bonds, which are "treated as property" where found, and bank notes, which "pass as money wherever they are"] consisting of bonds, mortgages and debts generally has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owner."[22]

This dictum also, as we shall see, has been qualified by later cases. But it is submitted that in spite of the criticism which the opinion has received as regards these two points, the case of the *State Tax on Foreign-held Bonds* in its fundamentals and essentials is still the law;[23] and that these essential holdings are, first, that a State cannot tax property beyond its jurisdiction; and second, that a debt is a taxable asset in the hands of the creditor and not in the hands of the debtor, and normally has its *situs* at the domicile of the creditor.

Kirtland v. *Hotchkiss*,[24] the other case already referred to as illustrating the general rule with respect to intangible personal property, is complementary to the case of the *State Tax on Foreign-held Bonds*. In the latter, the court refused to allow the State of the debtor to tax the debt due the foreign bondholder; in the former, the court sustained the right of the State where the bondholder was domiciled to tax the debt due him from the foreign debtor. The facts were as follows: Plaintiff, a resident of Connecticut, was assessed at his domicile

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[21]See Savings & Loan Society *v.* Multnomah County (1898) 169 U. S. 421, 431, 432. *Supra*, p. 380, and note

[22](1872) 15 Wall. 300, 324.

[23]Compare the statement of Holmes, J., in Blackstone *v.* Miller (1903) 188 U. S. 189, 206: "The decision has been cut down to its precise point by later cases," with the view expressed by Peckham, J., in Buck *v.* Beach (1907) 206 U. S. 392, 408, that "Although the language of the opinion in the case of State Tax on Foreign Held Bonds, *supra*, has been somewhat restricted so far as regards the character of the interest of the mortgagee in the land mortgaged . . . the principle upon which the case itself was decided has not been otherwise shaken by the later cases."

[24](1879) 100 U. S. 491.

on account of certain bonds given by a resident of Illinois, payable to plaintiff, his heirs, administrators or assigns, at a bank in Chicago. The bonds were made under, and to be construed by the law of Illinois, and were secured by deeds of trust upon Chicago real estate, the latter executed in favor of a trustee there resident, who had power by the terms of the deed to sell the property and apply the proceeds in payment of the loan, in case of default. The statute of Connecticut provided that personal property in that State "or elsewhere" should include "all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), chattels, or effects, or any interest thereon." The statute expressly exempted from its operation "moneys or property actually invested in the business of merchandising or manufacture, when located out of the State." The Supreme Court of Connecticut held the assessment valid, and on error to the United States Supreme Court this holding was sustained. In the course of its opinion the Court cited and relied on the case of the *State Tax on Foreign-held Bonds,* and said:[25]

"Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides. . . . That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains."

Such were the leading cases laying down the general rule that intangible personal property has its *situs* for taxation at the domicile of the owner when the first of the recent cases establishing and defining an exception to this rule came before the Court. These cases in their order are as follows:

New Orleans v. *Stempel.*[26]

This case arose on appeal from the Circuit Court of the United States for the Eastern District of Louisiana. A statute of Louisiana, passed in 1890, specifically taxed "all rights, credits, bonds, and securities of all kinds, promissory notes, open accounts

[25](1879) 100 U. S. 491, 498.
[26](1899) 175 U. S. 309.

and other obligations; all cash." It was made the duty of the assessors to "list all property subject to taxation" and it was further provided[27] that "this shall apply with equal force to any person or persons representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through an agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or *credits arising from the business done in this State are hereby declared assessable* within this State, and at the business domicile of said non-resident, his agent or representative." Such being the Louisiana law, the plaintiff, a resident of New York, inherited property in Louisiana consisting of credits, evidenced by notes, largely secured by mortgages on real estate in New Orleans, both notes and mortgages being kept in New Orleans in the possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited same in a bank in New Orleans to the credit of the plaintiff. The Circuit Court enjoined the collection of taxes on this property, but this was reversed on appeal to the Supreme Court, which after reviewing the Louisiana decisions held the property in question presumptively taxable under the Louisiana law and declined to find in such taxation any violation of the federal Constitution. Said the Court:[28]

"If we look to the decisions of other States we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage or other written instrument, and that written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner, to be by him used for the purposes of collection and deposit or reinvestment within the State, its taxable *situs* is in the State."

And in closing its opinion the Court used the following language:[29]

"Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

Bristol v. *Washington County*.[30]

[27] *Ibid.*, p. 313. The italics are the present author's.

[28] *Ibid.*, p. 317.

[29] *Ibid.*, pp. 322-323.

[30] (1900) 177 U. S. 133.

This case arose on appeal from the United States Circuit Court for Minnesota and the important facts and circumstances were very similar to those in *New Orleans* v. *Stempel,* except in two particulars. First, the Minnesota State statutes appear merely to have contained the usual provisions "that all personal property in the State was subject to taxation, and that all moneys and credits should be listed by the owner or his agent where one or the other resided."[31] Secondly, the New York owner of the Minnesota credits caused the notes, although not the mortgages, of the Minnesota debtors to be sent on to New York for custody, and after a time revoked the power of the Minnesota agents to execute satisfaction. But the Supreme Court, speaking through Chief Justice Fuller, remarked:[32] "Nevertheless the business of loaning money through the agency in Minnesota was continued during all these years just as it had been carried on before", and held that the credits in question had acquired a taxable *situs* in Minnesota.

Board of Assessors v. *Comptoir National.*[33]

The third case was another appeal from the United States Circuit Court for the Eastern District of Louisiana. It arose under the same legislation as that involved in *New Orleans* v. *Stempel, supra,* the facts being varied to the extent that the Louisiana agent bank loaned money on collateral such as bills of lading, and took checks as memoranda of the indebtedness instead of notes, the checks and collateral being held by the agent until each transaction was closed. The Supreme Court upheld the taxation of these credits in Louisiana.

Metropolitan Life Insurance Co. v. *New Orleans.*[34]

This case is perhaps the most illuminative in the entire series. It arose on error to the Supreme Court of the State of Louisiana under a statute substantially the same as that considered in the two prior Louisiana cases which taxed "credits, money loaned, bills receivable, etc.," with a special proviso that the law should apply "with equal force to any person or persons representing business interests in this State that may claim domicile elsewhere. . . . and all bills receivable, obligations or *credits arising from*

[31] *Ibid.,* p. 141.
[32] *Ibid.,* p. 143.
[33] (1903) 191 U. S. 388.
[34] (1907) 205 U. S. 395.

the business done in this State are hereby declared assessable in this State and at the business domicile of the said non-resident, his agent or representative."[35] The plaintiff in error, a life insurance company, had a local agent in New Orleans, and loaned money to its Louisiana policy holders through this New Orleans agent, upon the borrower's note secured by his policy as collateral. Both the note and the policy were forwarded to the home office in New York. Interest was paid to the agent and by him transmitted to the home office. When a note was to be paid, it was sent to the agent, who received payment and turned over the note to the maker. The Court pointed out that "the disputed tax was not *eo nomine* on these notes, but was expressed to be on credits, money loaned, bills receivable, etc."[36]

In delivering the unanimous opinion of the court, Mr. Justice Moody called attention to the impartial treatment accorded residents and non-residents, and succinctly summarized the three preceding cases of the series. He pointed out that in *New Orleans* v. *Stempel* and *Board of Assessors* v. *Comptoir National* "the written evidences of the credits were continuously present in the State [where they were taxed], and their presence was clearly the dominant factor in the decisions";[37] while in *Bristol* v. *Washington County* "the controlling consideration was the presence in the State of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial."[38] He held that the case in hand was indistinguishable:[39]

"Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the State. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long continued though not permanent absence, cannot have the effect of releasing them as the representatives of investments in business in the State from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true home, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that

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[35] *Ibid.*, p. 398. The italics are the present author's.

[36] *Ibid.*, p. 398.

[37] *Ibid.*, p. 400.

[38] *Ibid.*, p. 402.

[39] (1907) 205 U. S. 395, 402-403. The italics are the present author's.

credits evidenced by bonds or notes may have the *situs* of the latter, can be allowed to obscure the truth. *Blackstone* v. *Miller*, 188 U. S. 189. We are not dealing here merely *with a single credit or a series of separate credits, but with a business*. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidences of credits in the form of notes. Under such circumstances, they have a taxable *situs* in the State of their origin."

Buck v. *Beach*.[40]

This case followed only a year later. One Nash, a resident of New York, acting through an agent in Cincinnati, had loaned a large sum of money to residents of Ohio, taking the notes of the borrowers, secured by mortgages on land situated in Ohio. The notes growing out of the business done in Ohio, referred to as the "Ohio notes", were sent to another agent of Nash in Indiana for custody, and there kept except as they were returned to the Ohio agent for endorsement or payment. Further, the notes were sent out of Indiana and to the Ohio agent for a few days each year, covering April first, the day when the assessments for taxes are made in Indiana. Absolutely nothing else was done with respect to these "Ohio notes" in Indiana. Nevertheless the Supreme Court of Indiana held these notes to be there taxable; but on error the United States Supreme Court held: first, that "an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property held to be in Indiana, which really lies outside and beyond the jurisdiction of that State";[41] second, that, "the property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon";[42] third, that the notes "were only written evidence of the existence of the debts which were in fact thereby taxed";[43] fourth, that it could not "assent to the doctrine that

[40](1907) 206 U. S. 392.

[41]*Ibid.*, p. 402.

[42]*Ibid.*, p. 402.

[43]*Ibid.*, p. 403.

the mere presence of evidences of debt, such as those notes, under the circumstances already stated, amounts to the presence of property within the State for taxation."[44] The Court then quotes with approval from the *State Tax on Foreign-held Bonds*:

"All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, whatever that may be,"

and adds,

"The cases cited in *Metropolitan Insurance Co. case, supra,* show that this rule is enlarged to the extent of holding that capital, evidenced by written instruments, invested in a State may be taxed by the authorities of the State, although their owner is a non-resident and such evidences of debt are temporarily outside of the State when the assessment is made."[45]

Mr. Justice Day dissented on the ground that the notes were more than mere evidences of debt, "and for many purposes may be regarded as of the value of the debt which they evidence." He relied particularly upon expressions regarding the nature of notes in *New Orleans* v. *Stempel,* and *Blackstone* v. *Miller.*[46] Mr. Justice Brewer who had read the opinion of the Court in *New Orleans* v. *Stempel,* concurred in this dissent.

Liverpool Insurance Co. v. *Orleans Assessors.*[47]

The latest case in the series also arose on error to the Supreme Court of the State of Louisiana. This case differed from the other Louisiana cases in that the assessment was on credits on open account; *i. e.,* premiums due by residents to a non-resident insurance company, which had been extended, but for which no written obligations had been given. This difference was held to be immaterial. It was held that these "abstract" intangible credits must have a *locus* for taxation somewhere; that the question was merely one of jurisdiction. Mr. Justice Hughes, delivering the unanimous opinion of the Court, said:[48]

"The legal fiction expressed in the maxim *mobilia sequuntur personam,* yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as *did those in the present instance,* the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The *debt, of course, is not property in the hands of the debtor*; but it is

[44] *Ibid.,* p. 406.
[45] *Ibid.,* pp. 407, 408.
[46] (1903) 188 U. S. 189, 206.
[47] (1910) 221 U. S. 346.
[48] *Ibid.,* p. 354. The italics are the present author's.

an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement."

The court proceeds to uphold the power of a State in which a person transacts his business, to lay a tax on credits there accruing to him against resident debtors,[49] and concludes by quoting with approval the essential language of Mr. Justice Moody in *Metropolitan Life Insurance Co.* v. *New Orleans.*[50]

CONCLUSIONS AND SUMMARY.

The half dozen cases which have just been summarized—all of them decided since 1899—clearly and firmly establish an exception to the general rule that intangible personal property has its *situs* for taxation at the domicile of the owner. They hold that the owner of such property may so deal with it as to give it a *situs* for taxation in a State other than that of his domicile. It remains to consider the scope, limitations and logical corollaries of this exception.

What is the element, or what are the elements which determine when intangible personal property is localized for taxation in a jurisdiction other than that of the owner's domicile? In the first place it should be noted that the first case of the series just summarized, *New Orleans* v. *Stempel,* as well as all of the others except one, arose in Louisiana, and that the draftsman of the Louisiana tax law was not only at great pains to write into the statute itself the intent of treating the non-resident and resident owner of intangible property exactly alike, but by a reference to "credits arising from business done in this State" he makes the statute assert almost in terms that the credits which were being taxed were actually localized within the borders of Louisiana according to the test which the court has come to apply.[51] And while of course a State legislature cannot vali-

[49] *Ibid.*, p. 356.

[50] The case of the State Tax on Foreign-held Bonds was distinguished on the short ground that the bonds in that case were made payable "out of the State" (p. 355). But it is submitted with deference that this distinction fails with respect to the first issue of $500,000 worth of bonds, which figures in that case, which appears to have been payable in Pennsylvania (Philadelphia), although the second two issues were payable in New York. It is submitted that the real distinction lies in the fact that under all the circumstances of the present case it could properly be held that the creditor had localized the debt due him in the state of the debtor's residence, and that the mere place of payment is only one element in determining whether or not the debt had been so localized.

[51] See *supra*, pp. 386, 387; *infra*, p. 398.

date an action by declaring that its intent is legitimate and its result within the jurisdiction of the State, if in fact it is neither, it is believed that the references in the various opinions of the court to the peculiar terms of the statute suggest that the happy phraseology of the draftsman was not without its influence, and that legislators seeking for similar results would do well not only to aim merely at substantial justice, but to make their good intentions of record.

But turning from this minor matter of phraseology to matters of substance, it is submitted as has already been stated in discussing the *State Tax on Foreign-held Bonds* that these decisions fully recognize the proposition there laid down, that debts are always the property of the creditors and not of the debtors, and that they do not hold debts taxable in the State of the debtor's domicile because the debtor lives there, but because the creditor —that is, the owner—has dealt with the credit in the State where the debtor lives in such a way as to make it an asset of the creditor in that jurisdiction, instead of in the jurisdiction where the creditor resides.

But this brings us back to the question, how does the owner do this? It seems impossible to say that any one circumstance in and of itself is decisive of this question. Many things must be taken into account. The presence of written evidences of debt, such as notes and mortgages, while valuable evidentially and "the dominant feature" in two of the earlier cases decided,[52] is clearly not an essential feature.[53] Even "abstract credits" for which no written obligations have been given can be localized for taxation.[54] Moreover, the physical presence of the notes and mortgages in any jurisdiction, unaccompanied by any other circumstances or the transaction of any business in connection therewith does not localize the credits so evidenced for taxation in that jurisdiction.[55]

The maintenance of an agent or agency for the transaction of business within a State is an important element in showing that the credits arising out of the business have been localized for taxation within that State. And this element is in fact present in all the cases of the series. Yet, as has been pointed

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[52]New Orleans *v.* Stempel, and Board of Assessors *v.* Comptoir National, *supra.*

[53]Metropolitan Life Ins. Co. *v.* New Orleans, *supra.*

[54]Liverpool Ins. Co. *v.* Orleans Assessors, *supra.*

[55]Buck *v.* Beach, *supra.*

out,[56] it would seem that the maintenance of an agent within a jurisdiction is not in theory an essential feature of localizing a credit within that jurisdiction. It would seem possible, for instance, for a New York business man who commuted from New Jersey to localize his credits for taxation in New York, without the intervention of any agent.

Other possibilities of much greater practical importance suggest themselves. For instance, would it be possible for this same New Jersey commuter to localize at his New York office a credit growing out of the debt of a debtor domiciled in Connecticut. Or, to take another illustration, would it have been possible for the Indiana Agent in *Buck* v. *Beach* to have so dealt with the loans represented by the "Ohio notes" as to have localized them for taxation in Indiana. In other words, it is suggested that the possibility of localizing credits in a State other than that of the owner's domicile is not confined to "credits there accruing . . . against resident debtors", as might be inferred if the language of the Supreme Court in *Liverpool Insurance Co.* v. *Orleans Assessors* were to be taken strictly without taking account of the fact that the debtors in that case, as will ordinarily be the case, were as a matter of fact resident debtors.

As Mr. Justice Moody says in the great case of the series, *Metropolitan Life Insurance Co.* v. *New Orleans,* "we are not dealing here merely with a single credit, or a series of separate credits, but with a business. The Insurance Company chose to enter into the business of lending money in the State of Louisiana and employed a local agent to conduct that business."[57] If *A,* domiciled in New Jersey, loans a million dollars to *B,* domiciled in New York, by one transaction, either through the use of the mails or by a personal visit or through the medium of a New York trust company, a simple relation of debtor and creditor having been established between *B* and *A,* and the evidences of the credit being kept by *A* in New Jersey, *A* would not appear under the decisions to have localized this credit in New York. If *A,* resident in New Jersey, places a million dollars in the hands of a New York trust company, with instructions to loan it and keep it loaned for him on New York real estate, making and renewing the loans from time to time according to the judg-

[56]Judson, Taxation § 396.

[57]*Supra,* p. 390.

ment of the trust company, keeping the notes and mortgages in the vaults of the trust company and merely remitting the interest less commissions, semi-annually to *A* in New Jersey, the credits arising out of this business would appear under the decisions to be localized for taxation in New York.

It is evident that the permutations and variations of this transaction are infinite, and that the subject will require considerable further elucidation and definition from the Supreme Court if our States continue to maintain the present unjust and unscientific general property tax.

But assuming that it has been decided in any particular case that the owner of intangible personal property has localized this property for taxation in a State other than that of his domicile, what follows as to the taxation thereof in the State of his domicile? It is submitted that if a creditor living in New Jersey can give his intangible personal property, *i. e.*, his loans, a *situs* for taxation in New York, then it follows that this property is not taxable in New Jersey, the State of his domicile, or anywhere else. If, as the Supreme Court has said in the latest case of the series, credits being incorporeal have no actual *situs* but "they must be regarded as taxable and the question is only of jurisdiction,"[58] then if New York has jurisdiction, New Jersey, it is respectfully submitted, does not have jurisdiction to tax this intangible property localized in another State, any more than it would have if it were tangible property. This is submitted with great deference, in view of the contrary opinion of a distinguished authority,[59] and in view of certain judicial expressions by way of dicta which might be thought to lend countenance to this contrary opinion.

For instance, in *Bristol* v. *Washington County*,[60] Fuller, C. J., remarked: "Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax." (Citing authorities). But when the question squarely arose six years later in *Union Transit Company* v. *Kentucky*, whether or not tangible personal property (cars) permanently

[58]Liverpool Ins. Co. *v.* Orleans Assessors, *supra*, at p. 354.

[59]"The Extent and Evils of Double Taxation in the United States," by Frederick N. Judson, Annals of the American Society of Political & Social Science, March, 1915, pp. 105, 108, 109.

[60](1900) 177 U. S. 133, 145.

located without the State in which the owner was domiciled could be taxed to the owner in the State of domicile, the court held squarely that it could not, thus overruling Chief Justice Fuller's dictum in *Bristol* v. *Washington County,* so far as tangible personal property is concerned. True, as has been pointed out,[61] the court in the course of its opinion in that case observed: "It is unnecessary to say that this case does not involve the question of taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations."[62] But although the court did not decide, nor intend to decide, anything with respect to the taxation of intangible personal property, a question which is of course, as the court remarked, "controlled by different considerations" in some respects,—it is submitted with all deference that the particular rule laid down is equally applicable to both classes of personalty and that the same property legally speaking[63] cannot be in two States at once for purposes of taxation, when it is intangible any more than when it is tangible. The maxim *mobilia sequuntur personam* is no more sacred as respects one

[61]See paper by Mr. Judson, Annals of the American Society of Political & Social Science, March, 1915, pp. 105, 109.

[62]Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 211.

[63]Of course it is necessary to bear in mind the distinction between double taxation in a legal and in an economic sense, to which the Supreme Court draws attention in Union Transit Company *v.* Kentucky (1905) 199 U. S. 194, 205. It is submitted that such expressions as the following, from Kidd *v.* Alabama, which are sometimes quoted in this general connection, clearly refer to double taxation in an economic sense:

"No doubt it would be of great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of *substantially the same* property in two jurisdictions could be avoided. But the Constitution of the United States did not go so far. . . . The State of Alabama is not bound to make its laws harmonize in principle with those of other States." (1903) 188 U. S. 730, 732; italics are the present author's.

Moreover, it is suggested in passing that even those cases where it is ordinarily assumed that double taxation in an economic sense is permissible, such as the taxation of land in State *A* to the mortgagor, and the mortgage debt in State *B* to the mortgagee, or the property of a corporation to the company in State *A,* and the shares of the capital stock to the stock-holder in State *B* [See Kidd *v.* Alabama (1903) 188 U. S. 730; Darnell *v.* Indiana (1912) 226 U. S. 390] are cases where one and the same piece of property in an economic sense—although two pieces of property in a legal sense—are taxed to two different people. No case has been noted where under the general property tax the same man has been taxed twice on the same piece of property even in an economic sense, much less in a legal sense.

kind of property than the other.[64] Taxation is the correlative of protection in the one case just as much as in the other. The differences are historical and practical. And when the Supreme Court has solved these differences by finding that intangible property has been successfully localized and taxed to its owner in a State other than that of his domicile, it is submitted that both law and logic forbid the taxation of that same property in a legal sense to the same man in the State of his domicile, or any other jurisdiction.[65]

Summarizing generally, as to the effect of the series of cases which have been considered upon the law with respect to the *situs* of intangible personal property for purposes of taxation, it is submitted:

1. That these cases show that fundamentally the situation with respect to tangible and intangible personal property is the same; namely, such property is taxable at its actual *situs* (although intangible personal property has of course no physical location).

2. For historical and practical reasons the general rule is that intangible personal property has its *situs* for taxation in the State in which the owner (*i. e.,* in case of credits, the creditor) is domiciled.

3. In certain exceptional cases it has been held that the owner may so deal with his intangible personal property as to localize

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[64]See the expression of Holmes, J., in Blackstone v. Miller (1903) 188 U. S. 189, 206: "And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other."

[65]Although there is no Supreme Court case which decides the point, it is believed that Buck *v.* Beach (1907) 206 U. S. 392, 406, so far as it goes distinctly supports the view set forth in the text. The Court in the course of its opinion, denying the right of Indiana to tax the "Ohio notes" in that case (see *supra* p. 390) said:

"Our decision in this case has no tendency to aid the owner to taxable property in any effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts, evidenced by the notes, in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there and which if so taxed would make double taxation almost sure, which is certainly not to be desired and ought, wherever possible, to be prevented."

It is submitted that the same line of reasoning which prevents the State of Indiana from taxing the debt localized and having a *situs* for taxation in Ohio, simply because the debt was evidenced by notes physically present in Indiana, would also prevent the taxation of this same debt in New York, simply because the owner lived there.

it for taxation in another jurisdiction than that of his domicile. In the decided cases such taxation has only been upheld where a creditor was doing business or engaged in the investment of capital as a business in the State where the debtor was domiciled.

4. If the exceptional circumstances exist, in which intangible personal property is held to have acquired a *situs* for taxation in another jurisdiction than that of the owner's domicile, then it must necessarily follow that it loses its original *situs* at the domicile of the owner, and is taxable at its new *situs* only, and not elsewhere.

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